

On 19 November 2020, the Spanish government modified the mechanism of foreign investment control in Spain, as set out below.

The fourth final provision of Royal Decree-Law 8/2020 of 17 March introduced an amendment to Law 19/2003 of 4 July, establishing a better national mechanism for the control of foreign direct investment in the secondary capital market in relation to the situation caused by the COVID-19 health crisis.

This modification extends the obligation of authorisation provided for in article 6 of said law to investments made by investors residing in EU countries or the European Free Trade Association in certain strategic sectors. Those sectors include, among others, critical infrastructures and technologies, provision of key inputs, sectors with access to sensitive information and media. As per the high volatility the health crisis generated in secondary capital markets, all of these sectors were exposed to investments made with control objectives, which posed a risk to public safety, public order and public health.

The modification introduced by Royal Decree-Law 8/2020 was amended by Royal Decree-Law 11/2020 of 31 March by extending investment restrictions to investors residing in member countries of the EU or the European Free Trade Association if said European investors were indirectly controlled by non-residents.

The new Royal Decree-Law 34/2020 of 17 November has amended the above to extend the authorisation regime until 30 June 2021, affecting foreign direct investments in companies listed in Spain (those whose shares are, in whole or in part, admitted to trading on an official Spanish secondary market and are registered in Spain) and/or in unlisted companies if the value of the investment exceeds €500 million, made by residents of other countries of the EU or the European Free Trade Association.

In this regard, foreign direct investment means investments made by an investor who becomes the owner of a quota of shares equal to or above 10% of the share capital of the Spanish company. In addition, it is considered a foreign direct investment when, through a corporate transaction, the investor acquires the control of that company, and if the above two scenarios are carried out by residents of state members of the EU or the European Free Trade Association other than Spain, together with if they are made by residents of Spain whose actual ownership corresponds to residents of other state members of the EU or the European Free Trade Association.

In addition, Royal Decree-Law 34/2020 of 17 November has clarified that, for the purpose of considering foreign direct investment in Spain, the criteria laid down in Article 7.2 of Law 15/2007 of 3 July, on the Defence of Competition, will determine whether there has been a take-control.

Royal Decree-Law 34/2020, with the aim of having a widespread and unified control criterion, has deleted the following paragraph of Article 7bis.1: "It will be possible to establish, in accordance to applicable regulation, the amount below which foreign direct investment transactions will be exempt from submission to the prior authorization regime established by regulation."

Likewise, the Royal Decree expands and clarifies the sectors that are subject to prior authorisation, including the sectors of key technologies for industrial leadership and training, as well as technologies developed under programmes and projects of particular interest to Spain. It also includes the sector of supply chain of fundamental consumptions with the incorporation of those related to strategic connectivity services.

In addition, the Royal Decree, with the aim of extending the objective of implementing the suspension of the liberalisation regime and focusing it on risk to the Spanish market, modifies one of the cases in which the liberalisation regime is considered suspended. These will be applicable to cases where there is a serious risk that the foreign investor will engage in criminal or illegal activities, affecting public safety, public order or public health in Spain.

Finally, the Royal Decree introduces a paragraph 6, which enables the necessary regulatory development of an exemption regime to comply with the requirement to apply for authorisation for foreign direct investment. This will apply to those investments that have no or little impact on the legal goods protected by Article 7a, enabling the Minister of Industry, Trade and Tourism to issue the necessary rules for the correct application and enforcement of the above.

All of these amendments came into effect on 19 November 2020 regardless of the negotiation status of a transaction.

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